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(1)

CANCELLED

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

Division Bench (riminal

Criminal Appeal No. 1239 /2000

Appellant : State of Madhya Pradesh

-Versus-

Respondents :1.Samar Vijay Singh Tomar aged about 20 years S/o Shri Ranvijay Singh Tomar, R/oRamanuj Ward, Ambikapur Distt.Surguja.

2.Rajkumar Tiwari, aged 20 years, S/o Shri Laxman Tiwari R/o Qr.No.1-C/60 Vishrampur P.S.Vishrampur Distt.Surguja.

3.Jawed Alam aged about 19 years, S/o Mohd. ~~Akam~~ Pharuq Alam, S/o Khe Ursia, Naka Ambikapur Distt.Surguja.

4.Ganesh Kashyap aged 20 years, S/o Shri Dashrath Ram Kashyap, R/o Kharsia Nakar, Ambikapur,Distt. Surguja.

APPEAL UNDER SECTION 377 OF THE Cr.P.C. 1973 FOR ENHANCEMENT OF SENTENCE

(65)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.594/2000

Samar Vijay Singh Tomar and another

Versus

State of Chhattisgarh

Criminal Appeal No.716/2000

Javed Alam and another

Versus

State of Chhattisgarh

Criminal Appeal No.1239/2000

State of Chhattisgarh

Verus

Samar Vijay Singh Tomar & three others

AND

Criminal Appeal No.783/2005

State of Madhya Pradesh (now Chhattisgarh)

Vs.

Ranvijay Singh Tomar

Judgment for Consideration

Sd/-
Dilip Raosaheb Deshmukh
Judge

HON'BLE SHRI JUSTICE FAKHRUDDIN

While Concurring & Agreeing I have added a additional ground

Sd/-
Fakhruddin
Judge

Post for judgment: 20.03.2006

Sd/-
Fakhruddin
Judge

Sd/-
Dilip Raosaheb Deshmukh
Judge

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.594/2000

Samar Vijay Singh Tomar and another

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Verus

Samar Vijay Singh Tomar & three others

AND

Criminal Appeal No.783/2005

State of Madhya Pradesh (now Chhattisgarh)

Vs.

Ranvijay Singh Tomar

Coram: Hon'ble Shri Justice Fakhruddin &
Hon'ble Shri Justice Dilip Raosaheb Deshmukh, JJ.

Shri Surendra Singh, Senior Advocate with Shri Neeraj Kumar Mehta for the appellants.
Shri Pramod Kumar Verma, Addl. Advocate General for the State.
Smt Meena Shastry, learned counsel for the complainant.

J U D G M E N T
(Delivered on 20.03.2006)

Per Dilip Raosaheb Deshmukh, J.

1. Vide Judgment dated 23rd February, 2000 delivered in Sessions Case No. 07/1999 by Shri A.S.Naidu, Sessions Judge, Sarguja, the appellant Samar Vijay Singh was convicted under Section-302 of the I.P.C. for committing murder of Ku. Preeti Shrivastava by intentionally causing her

death on 03-12-1998 at 10.45 A.M. in Govt. Girls College Campus, Ambikapur by running her over by Jeep No.M.P.-27-B-1068 and sentenced to undergo imprisonment for life and a fine of Rs.1,000/- & in default to undergo additional rigorous imprisonment for 6 months. Co-accused Rajkumar Tiwari, Javed Alam & Ganesh Kashyap were convicted under Section 302 read with Section-34 of the I.P.C. for intentionally causing the death of Ku. Preeti Shrivastava in furtherance of the common intention with the appellant Samar Vijay Singh and sentenced to imprisonment for life and to pay a fine of Rs.1,000/- and in default to undergo additional rigorous imprisonment for 6 months. Co-accused Ranvijay Singh Tomar, father of appellant Samar Vijay and owner of the jeep used by the above accused persons for committing the aforesaid offence was acquitted from the charge under Section-201 of the I.P.C.

2. Appellants Samar Vijay Singh and Raj Kumar Tiwari preferred Criminal Appeal No.594/2000 while appellants Javed & Ganesh preferred Criminal Appeal No. 716/2000, assailing their conviction and sentence as aforesaid. The State preferred Criminal Appeal No.1239/2000 for enhancement of sentence awarded to the appellants & Criminal Appeal No. 783/2005 against the acquittal of Ranvijay Singh Tomar under Section-201 of the I.P.C. This judgment governs all the abovementioned appeals.

3. Briefly stated the prosecution case is that on 03-12-1998 Ku. Preeti Shrivastava, a student of B.A. Final in Govt. Girls College, Ambikapur was sitting with Ku. Vijaylaxmi Mishra PW-7, Ku. Seema Mishra PW-8 and Ku. Nisha Thakur PW-17 in the campus of the College since the second period was free. Her bag and tiffin were kept by the side of the road. Many other girls were basking in the sun inside the campus. At about 10.45 A.M., a Jeep driven by Samar Vijay Singh suddenly entered the college campus and crushing the bag

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and the tiffin of Ku. Preeti Shrivastava underneath, went ahead. Appellants Rajkumar Tiwari, Javed Alam and Ganesh Kashyap were accompanying Samar Vijay Singh in the jeep. Seeing her tiffin & bag crushed by the jeep, Ku. Preeti Shrivastava decided that she would stop the jeep on its return and ask the driver to make good the loss suffered. When the jeep returned, Ku.Preeti stopped the jeep, stood in front of it and asked appellant Samar Vijay Singh to repair the tiffin and the bag for her. Hearing this, the occupants of the jeep including the driver started laughing. The girls noticed that the occupants of the jeep were calling each other by names and thereby learnt that Samar Vijay Singh, the driver of the jeep was accompanied by Rajkumar Tiwari, Javed Alam and Ganesh kashyap. Appellant Samar Vijay Singh asked Ku. Preeti to get out of his way, failing which, threatened to crush her under the jeep. However, Ku.Preeti stood firm and didn't budge. Appellant Rajkumar Tiwari, Javed & Ganesh asked appellant Samar Vijay to crush Ku. Preeti, if she didn't give way. Upon this, Samar Vijay moved the jeep ahead and pushed Ku. Preeti who fell down. When the girls were about to move for picking up Preeti, Samar Vijay Singh reversed and then accelerated the jeep ahead, crushing Preeti's head under the jeep in the process & ran away with the co-appellants.

4. Ku. Vijaylaxmi PW-7, threw a stone on the jeep, which hit the bumper of the jeep. She noted down the number of the jeep in her palm as M.P.-27-1962. Ku. Lalita Yadav PW-6, attempted to catch hold of one of the appellants but she was pushed and fell down. Ku.Vijaylaxmi noticed that the jeep had a "sticker" "Vote for the Congress" on the back number plate

5. The girls got frightened and informed Asst. Professor Smt. Archana Singh PW-9 and Asst. Professor Smt. Pratibha Singh PW-10 about the incident who along with Ku. Lalita Yadav PW-6, Ku.Vijaylaxmi PW-7, Ku. Kumudini Kerkatta PW-4 & Ku. Urmila Paikra PW-5 took the injured Ku. Preeti to

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the District Hospital, Ambikapur. Clerk Tarachand Sahu PW-11 of the Girls College reached the spot thereafter and on being instructed by the Principal lodged the F.I.R. Ex.P-12 at 11 A.M. in Police Station-Ambikapur to Asst. Sub-Inspector B.N.Singh PW-31.

6. Dr. M.L. Beatrice PW-3, Chief Medical and Surgical Supdt., Holy Cross Hospital who first examined Ku. Preeti Shrivastava at the District Hospital, Ambikapur found her to be in deep coma with profuse bleeding from the nose and mouth with her nasal bone fractured. She also found a depressed fracture in the occipital region of Ku. Preeti size 2.5" x 2". On being informed by Ku. Vijaylaxmi PW-7 and Ku. Lalita Yadav PW-6, she wrote "Hit by jeep on the head and knocked down and passed over by front and back wheel of the jeep" in her report Ex.P-4. Soon after Ku. Preeti Shrivastava succumbed to the injuries at 12.10 P.M.

7. Upon F.I.R. Ex.P-12 being lodged at 11 A.M. Assistant Sub-Inspector Hardeep Singh PW-36 reached the Hospital. In the meanwhile, Shri R.L.Shrivatava PW-32, father of Ku.Preeti Shrivastava, on receiving information about the incident had already reached the hospital and enquired about the incident from the girls who were present there. A.S.I. Hardeep Singh recorded merg intimation Ex.P-19 on the report of Laboratory Technician Mariam Tirky PW-16 and prepared inquest Ex.P-18. In presence of Shri R.L. Shrivastava PW-32 he also recorded the statements Ex.P-10 and Ex.P-7 respectively under Section-161 of Cr.P.C. of Ku.Vijaylaxmi PW-7 and Ku. Lalita Yadav PW-6 on 03-12-1998 at the District Hospital who told him that since the occupants of the jeep while talking were addressing each other by their names, they learnt that the driver of the jeep was Samar and the occupants of the jeep were Rajkumar Tiwari, Javed and Ganesh. They also stated that the occupants of the jeep had said "Samar if the girl does not give way, crush her under the

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Jeep". In the merg intimation Mariam Tirky PW-16 gave the Jeep No. as M.P.-27 B -1068.

8. Dr. A.K. Jain PW-33 Medical Officer, District Hospital, Ambikapur conducted the autopsy on the body of Ku. Preeti Shrivastava on 03-12-1998 and found the following external injuries :-

A. An abrasion on left scapular region 8 x 6 cm (Eight on by six cm) red in colour, and obliquely placed,
B. An abrasion to right side of back middle part measuring 10 x 6 cm extending to right scapular region red in colour obliquely placed;
C. An abrasion, right knee, laterally 8 x 3 cm, red in colour,
D. An abrasion on right thigh upper part medially 2 x 2 cm, red in colour,
E. Two abrasions over right foot, one at the lateral border 2 x 3 cm, and second one on right malleola, lateral side 2 x 2 cm red in colour, obliquely placed,
F. Depression and crepitus at occipital region and right zygomatic region 8 x 4 cm,

On internal examination, he recorded the following findings:

A. Skull :- There was depressed fracture in occipital bone and zygomatic bone 8 x 4 cm extending up to zygoma,

B. Meninges and brain injured due to fracture and brain matter came out, huge haemotoma present and blood present cranial cavity,

C. Fracture of the third rib left side anterolaterally,

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D. Pleura injured, trachea and throat was healthy, left lung was injured and gorged, blood present in pleural cavity , right lung was also gorged blood present in pleural cavity, in heart the blood was present, in little quantity in right chamber and the left was empty, Aerota containing little blood, mouth, esophagus, covering of intestine and diaphragm, were healthy, in stomach, there was semi digested food material, large intestine, little facial matter was present, liver was ruptured posteriorily, and blood was present in paritonial cavity, spleen and kidney were healthy, uterus was healthy, blader was full of urine, uterus was of normal size.

Dr. Jain opined vide report Ex.P-37 that death was due to coma as a result of fracture of skull bone and injury to vital organs, brain, lung and liver.

9. Assistant Sub Inspector Hardeep Singh PW-36 reached the spot on 03-12-1998 and seized the blood stained Tar and soil and plain soil as also the black bag and broken tiffin of Ku. Preeti vide seizure memo Ex.P-25. On the same day at 3.00 P.M., he seized vide Ex.P-33 the Jeep No. M.P.-27-B-1068 which stood in front of the house of appellant Samar Vijay. In the front bumper of the Jeep some remains of blood stains which had been washed were noticed. At the back curtain a pamphlet of Congress-I was pasted.

10. On 04-12-1998 at 6 P.M., Town Inspector S.C. Mishra PW-39 arrested appellants Samar Vijay Singh, Rajkumar Tiwari and Javed Alam vide Ex. P-72, 73 & 74. On 05-12-1998 at 7.00 A.M., he also arrested Appellant Ganesh on surrender at the police station vide Ex.P-75. On the same day, he seized vide Ex.P-16 two stones having traces of light brown paint from near the spot in Govt. Girls College, Ambikapur. He also scratched the paint from the back of the seized Jeep, sealed

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and seized it vide Ex.P-34. On 06-12-1998 Ranvijay Singh Tomar, father of appellant Samar Vijay Singh and the owner of the jeep was arrested by him vide Ex.P-76. On 09-12-1998, a document Ex.P-71 was obtained from R.T.O., Ambikapur certifying Ranvijay Singh Tomar as the owner of the jeep. Senior Scientific Officer, Forensic Science Laboratory, Scene of Crime Unit, Sarguja performed Benzidine Test on the mud of the left mudguard and on the stains found on the left front tyre. This test was positive indicative of presence of blood. On being sent for chemical examination to Forensic Science Laboratory, Sagar vide report Ex.P-79 presence of blood was confirmed on the mud scratched from the front mudguard of the Jeep. However, this was not found sufficient for examination by Serologist. Vide report Ex.P-80 of the Forensic Science Laboratory, Sagar, the paint scratched from the stones (seized from the spot inside the college campus) and the Jeep were found to be of similar origin.

11. Investigation revealed that appellant Rajkumar had soon after the occurrence gone to Abhaydeep Singh PW-2 and told him that the Jeep driven by Samar Vijay Singh had dashed against a girl. Statement under Section-164 of Cr.P.C. Ex.P-3 of Abhaydeep Singh PW-2 was recorded by Shri S.R.Banjare, J.M.F.C., Ambikapur on 18-12-1998. After completion of investigation, prosecution was launched against appellant Samar Vijay Singh under Section-302 of I.P.C., against Rajkumar Tiwari, Javed Alam, Ganesh Kashyap under Section-302 read with Section-34 of the I.P.C. and under Section-201 of the I.P.C. against co-accused Ranvijay Singh Tomar for causing disappearance of evidence of murder by washing the blood stains on the jeep.

12. Appellants Samar Vijay Singh, Rajkumar, Ganesh, Javed and co-accused Ranvijay Singh Tomar abjured the guilt. Prosecution examined as many as 39 witnesses. The learned Sessions Judge, Ambikapur acquitted Ranvijay Singh Tomar

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for want of evidence and convicted Samar Vijay Singh under Section-302 of I.P.C. and Raj Kumar Tiwari, Javed Alam and Ganesh Kashyap under Section-302 read with Section-34 of the I.P.C. and sentenced them as aforesaid in para-1 on the basis of the following evidence –

A. Testimony of Ku. Lalita Yadav PW-6, Ku. Nisha PW-17, Ku. Seema Mishra PW-8, Dr. M.L. Beatrice PW-3, Dr. A.K. Jain PW-33 proving that Ku. Preeti died a homicidal death.

B. Statements made by Ku. Lalita Yadav PW-6 and Ku. Vijaylaxmi PW-7, as forming part of res-gestae under Section-6 of the Evidence Act. to Shri R.N. Shrivastava PW-32 on his reaching the hospital disclosing the names of the driver of the jeep as Samar Vijay Singh and the occupants of the Jeep as Rajkumar Tiwari, Javed and Ganesh.

C. Extra Judicial Confession made by the appellant Raj Kumar before Abhaydeep Singh PW-2 soon after the occurrence, also implicating appellant Samar Vijay Singh as the driver of the Jeep.

D. Testimony of Ku. Seema PW-8 especially in para-34 and 35 showing the three occupants of the Jeep had asked the driver Samar Vijay to run the girl over in case she didn't give way and Samar Vijay surging the jeep ahead crushed Preeti's head underneath.

E. Testimony of Arvind Gaur, Assistant Professor, P.G. College, Ambikapur PW-12 showing that Ganesh Kashyap, a student of B.Com 1st year 'B' section was absent from class on 03-12-1998.

F. Testimony of Professor Rajesh Shrivastava, P.G. College, Ambikapur PW-18 showing that

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on 03-12-1998 Samar Vijay Singh and Raj Kumar Tiwari, students of B.Com 1st year Section-'A' were absent from class (10 A.M. to 10.40 A.M.).

G. The fact of surrender by appellants Javed and Ganesh in Police Station-Ambikapur on 04-12-1998 vide Ex.P-74 and 75.

H. (i) Seizure of Jeep No. M.P.-27-B-1068 from, in front of the house of appellant Samar Vijay.

(ii) Merg intimation Ex.P-19 by Mariam Tirki PW-16 showing the number of the Jeep as M.P.-27-B-1068.

(iii) Testimony of Z.A. Abbasi PW-37 R.T.O. Office Ambikapur proving ownership of Ranvijay Singh Tomar over Jeep M.P.-27-B-1068.

(iv) Admission by Ranvijay Singh Tomar of the seizure of Jeep M.P.-27-B-1068, in reply to Question No.218 in examination under Section-313 of Cr.P.C.

13. Shri Surendra Singh, Learned Senior Counsel for the appellants Samar Vijay Singh, Rajkumar Tiwari, Ganesh Kashyap and Javed Alam argued that there was no legal evidence on record to substantiate the conviction and sentence awarded by the learned Sessions Judge. No common intention of the occupants of the Jeep to cause the death of Ku. Preeti was established by the prosecution. Evidence of Ku.Seema Mishra PW-8 was read in extenso while arguing that the driver of the Jeep merely wanted to get away as fast as possible and therefore the offence if any committed by the driver of the Jeep would not travel beyond Section-304 Part-I of the I.P.C., the alleged act being a rash or negligent act without any intention to kill Preeti. Referring to the testimony of Ku.Seema PW-8 and Ku. Nisha PW-17, it was next argued

that there has been an unfair and dishonest cross-examination by the prosecutor due to which the trial Judge was in error in holding that the identity of the driver of the Jeep was established. During investigation, no test identification of the appellants Samar Vijay Singh, Rajkumar Tiwari, Ganesh Kashyap and Javed Alam was got done from the witnesses who even did not identify the occupants of the Jeep in Court.

14. Serious objection was taken to the finding recorded in para-104 of the impugned judgment whereby the statements made by Ku. Lalita Yadav PW-6 and Ku. Vijaylaxmi PW-7 to Shri R.L.Shrivastava PW-32 were relied on as admissible and forming part of res-gestae under Section-6 of the Evidence Act., on the ground that both Lalita Yadav PW-6 and Ku. Vijaylaxmi PW-7 had turned hostile and the testimony of Shri R.L.Shrivastava PW-32 was merely hearsay since he admitted that the statements made by the abovementioned two girls were not spontaneous but upon asking. Reliance was placed upon *Pratap Singh & another Vs. State of Madhya Pradesh, through P.S.-Bhind* reported in **1970 M.P.L.J.-978**.

15. Reliance was also placed in the case of *Gentela Vijayavardhan Rao Vs. State of Andhra Pradesh* reported in **A.I.R.-1996-S.C.-2791** para-15, *Yasin Gulam Hyder v. State of Maharashtra* **1980-SC-878,** *Vijender v. State of Delhi* **1997 SAR (CRI)-365-para-7,** *Malkhan Singh v. State of M.P.* **1990-Cr.L.J-2763** and *Dhanna vs. State of Madhya Pradesh* **1996-SC-2478 Placitum 'C'**

16. It was also argued that reliance placed by the Sessions Judge upon the statement of Abhay deep PW-2 recorded under Section-164 of the Cr.P.C. was contrary to law since the statement recorded under Section-164 of the Cr.P.C. could only be used to corroborate or contradict its maker and extra judicial confession should be of such a nature as by itself would be sufficient to convict the accused. Reliance was

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placed on *Kanda Padayachi v. State of Tamil* Nadu **A.I.R. 1972-S.C.-66 Para-11, A.I.R.-2001-S.C.-1103 Placitum-"A" and** *Hiramba Brahma & another v. State of Assam* **A.I.R.-1982-SC-1595 Placitum-'B'.**

17. Reliance was also placed on *Pandurang & others v.State of Hyderabad* **A.I.R.-1955-SC-216 and** *Suresh & another vs. State of U.P.* **A.I.R.2001-SC-1344** Placitum –"B" while arguing that mere presence of Rajkumar Tiwari, Javed and Ganesh at the scene of the crime did not show culpability since there was no meeting of minds and no premeditated concert to kill Ku. Preeti. At the most it could be said that the appellants were carefree youngsters who had taken the Jeep inside the college campus merely to have a look at the girls and were laughing when Ku. Preeti tried to come to the middle of the Jeep and the driver backed the jeep to get away while Ku.Preeti had fallen upon a mild push. At the most it could be said that there was complete miscalculation and rashness on the part of the driver in trying to get away from the campus. The driver of the jeep alone could at the most be held guilty under Section-304 Part-I of the I.P.C. Reliance was placed on *Sadhu Singh v. State of Pepsu* **A.I.R.-1954-SC-271.** Absence of tyre marks either on the skull or on the clothes of Ku. Preeti as admitted by Dr. Jain PW-33 in para-10 falsified that Ku. Preeti was run over deliberately. Absence of the appellants Samar Vijay, Ran Kumar and Ganesh from college at the time of occurrence did not prove their complicity in the offence of murder of Preeti. Use of Jeep No.M.P.-27-B-1068 in the crime was also not established since the number of the offending vehicle was noted by Ku. Vijaylaxmi PW-7 to be M.P.-27-1962 and presence of human blood was not confirmed vide Forensic Science Laboratory Ex.P-79 on the soil seized from the left tyre of the jeep.

18. Replying to the above arguments Shri Pramod Verma, learned Additional Advocate General during his brief arguments

contended that the demeanor of the eye-witnesses as noted by the learned Sessions Judge revealed that the girls were under fear and tremendous pressure and were not willing to disclose the identity of the occupants of the Jeep barring stray statements made by some girls in their testimony. It also showed that the incident in which Ku. Preeti was crushed under the jeep and died had a tremendous impact on the minds of the girls who saw the occurrence. The evidence showed that the girls were under shock even at the hospital where they truthfully disclosed the names of the occupants and driver of the jeep to Shri R.N. Shrivastava PW-32, the shocked father of the deceased who had reached the hospital soon after learning about the incident. There was no time for deliberation or concoction. Every one was under shock and panic. Statements of Ku.Vijaylaxmi PW-7 and Ku. Lalita Yadav PW-6 under Section-161 of Cr.P.C. which were recorded by A.S.I. Hardeep Singh PW-36 on 03-12-1998 at the Hospital showed that both girls had stated that since the occupants of the Jeep were addressing each other by names and had asked Samar the driver of the jeep to run over Ku. Preeti if she didn't give way, they learnt about the identity of the driver as Samar and the occupants as Rajkumar, Ganesh and Javed. These girls had also given the history of the incident to Dr. M.L.Beatrice PW-3 who had recorded the same in Ex.P-4. Therefore, the testimony of Shri R.L.Shrivastava PW-32 that he was informed by the abovementioned girls about the names of the occupants and driver of the jeep at the hospital, forms part of res gestae and is admissible under Section-6 of the Evidence Act. Since there was no malice, no enmity or cause to falsely implicate innocent persons, the trial judge, in its quest for truth rightly relied on the testimony of Shri R.L.Shrivastava PW-32 to hold that Samar Vijay Singh was the driver and Rajkumar, Ganesh and Javed were the occupants who had asked Samar Vijay Singh to run Preeti over if she did not give way.

19. It was next argued that the very fact that Ku. Preeti had fallen after a gentle push by the Jeep and thereafter the Jeep was reversed and accelerated further, coupled with the serious injuries sustained by Preeti clearly reflected the intention of appellants Samar Vijay, Raj Kumar, Javed and Ganesh. The evidence of Dr. Jain P.W.33 and the findings recorded on internal examination during autopsy revealed the impact and speed at which the Jeep was accelerated ahead. The act of appellant Samar Vijay in running over the fallen Ku. Preeti and the act of appellants Raj Kumar, Javed and Ganesh in exhorting Samar Vijay to run Preeti over if she did not give way coupled with the fact that after Ku. Preeti fell, the Jeep was reversed and accelerated proved that the appellant Samar Vijay shared the common intention with Raj Kumar, Javed and Ganesh to kill Ku. Pretti by crushing her under the Jeep. As regards the evidence of Abhaydeep P.W.2 relating to extra judicial confession of appellant Raj Kumar, it was argued that Abhaydeep had no malice or enmity with Raj Kumar or any reason to falsely implicate him.

20. Learned Addl. Advocate General while arguing upon Cr.A.1239/2000 for enhancement of sentence awarded to the appellants Samar Vijay, Raj Kumar, Javed and Ganesh did not divulge any ground for enhancing the sentence or for awarding the extreme penalty. Cr. A. 783/2005 against acquittal of Ranvijay Singh Tomar, learned Addl. Advocate General left it wholly to the discretion of the Court, if it found any evidence on record to convict Ranvijay Singh Tomar under Section 201 I.P.C.

21. We have heard the rival contentions and have gone through the record of S.T.No.7/99 minutely. We have also gone through the various case laws cited by the learned senior counsel for the appellants. Ku. Lalita Yadav P.W.6 deposed that on 3.12.98 Ku. Pretti Shrivastava, alongwith Ku. Nisha P.W.17, Ku. Seema Mishra P.W.8, Ku. Vijaylaxmi P.W.7 and

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many other girls were sitting by the side of the road when the Jeep entered the college campus and crushing the bag and tiffin of Preeti, went ahead. Ku. Preeti said that she would ask the culprits to make good the loss and stood in front of the Jeep on its return. Preeti was hit by the bonnet of the Jeep. When Lalita ran, one of the boys pushed her due to which she fell. Vijaylaxmi noted the number of Jeep. The medical report Ex.P.4 written by Dr. M.L.Beatrice (P.W.3) clearly shows that Ku. Lalita had gone with the injured Preeti to the hospital and had given the history that Ku. Preeti was hit by the Jeep, knocked down and passed over by the wheel of the Jeep. There is no doubt that Ku. Lalita saw the entire occurrence and the culprits. The learned Sessions Judge noted her demeanor that she was nervous and was repeatedly trying to console herself. Obviously she did not have the courage to testify the truth.

22. The testimony of Ku. Vijaylaxmi P.W.7 clearly shows that she has suppressed the entire truth. She was the person who accompanied the injured Preeti to the hospital and gave the history of the incident, as mentioned above, to Dr. M.L.Beatrice P.W.3 which was recorded in report Ex.P.4 containing the name of Ku. Vijaylaxmi P.W.7 as the person giving the history of the incident. The testimony of Lalita Yadav P.W.6 shows that Ku. Vijaylaxmi P.W.7 was sitting with Ku. Preeti when the Jeep entered the campus. Obviously Ku. Vijaylaxmi was under fear while giving evidence and did not have the courage to speak the truth.

23. Ku. Seema Mishra P.W.8 blurted out during cross-examination some traces of truth which was labeled as unfair and dishonest cross-examination by the learned senior counsel for the appellants. At the end of the ordeal of her evidence she cried and requested the Court never to call her again for evidence since they were disturbed for the entire year. The plight of the girls who were under pressure from

forces which act in such cases, depicts the tremendous need for witness protection in our country if criminal justice administration was to be a reality.

24. Ku. Seema Mishra P.W.8 deposed that upon her bag and tiffin being crushed under the Jeep, Preeti stopped the Jeep on its return and stood in front of it and asked the boys to get the bag and tiffin repaired. There was a discussion as the boys declined. On this, Preeti stood in front of the Jeep and challenged the boys who were slowly moving the jeep, to repair the bag. The boys asked her to get out of their way failing which they would run her over. Preeti said she would not move and if they wished they could run her over. The driver changed gear and moved the Jeep due to which Preeti fell down. As they moved to lift Preeti the driver speedily drove the Jeep running it over Preeti. In reply to question 27 she said that she did not see the occupants which was sheer falsehood as in answer to the next question she said that there were four boys in the Jeep. This statement has not been controverted in cross-examination by the defence. In reply to the next two questions she said that she did not hear the boys taking each other's name. She was cross-examined by the public prosecutor. Question No.32, 34, 35 & 37 and the answers given are reproduced in English.

Q.32: We allege that the occupant boys in the Jeep were talking to each other and laughing.

Ans. Boys were laughing.

Q.34: The occupants of the Jeep were asking Samar, the driver of the Jeep to run the girl over if she did not give way.

Ans. Boys had said so but afterwards.

Q.35: After that Samar surged the Jeep ahead, crushed the head of Preeti and went away.

Ans. Yes.

Q.37: Pointing out towards the accused Samar Vijay, Javed, Raj Kumar and Ganesh, the witness was

asked if these were in the Jeep.

Ans. I do not remember.

25. In such a case the Court is required to function like the legendary swan in separating the grains of truth from the chaff of falsehood. The skillful cross-examination to elicit the truth is not the forte of the defence alone but can be a tool for the prosecutor when the witness suppresses the truth under fear. The Court ought not to act mechanically and accept statements given under fear or pressure, denying the complicity of the appellants in the crime and to ignore the threads of truth appearing in the testimony of a witness in answer to leading questions by the prosecutor. In reply to question 37, Ku. Seema did not say that the appellants were not the occupants of the Jeep but said she did not remember. There is no doubt that Ku. Seema P.W.8 saw the entire incident and also the appellants Samar Vijay, Javed, Raj Kumar and Ganesh from very close range in broad day light and the incident would remain recorded in her memory for a life time. She also admitted that the boys were laughing in the Jeep and had said to Samar that if the girl did not give way he should run the girl over. She said a positive 'yes' to a specific question No.35, clearly meaning that crushing Preeti's head Samar had surged the Jeep ahead. The trial Judge, in this case, rightly accepted the above portion of the testimony of Ku. Seema.

26. Ku. Nisha Thakur (P.W.17) has corroborated the testimony of Ku. Seema (P.W.8) mentioned above regarding the incident in which Ku. Priti got crushed under the Jeep. Regarding the complicity of appellant Samar Vijay, she stated during cross-examination by the defence in para 13 that the occupants of the Jeep had said that if Preeti does not give way Samar Vijay Singh should run the Jeep over her. In para 12 she has stated that the boys were laughing, she has again very positively asserted that one of the occupants of the Jeep had

said that if Ku. Preeti did not give way she should be run over by the Jeep. As held in *Gura Singh v. State of Rajasthan* **A.I.R. 2001 S.C. 330** the testimony of Ku. Nisha Thakur P.W.17, Ku. Seema P.W.8, Ku. Lalita Yadav P.W.6 cannot be brushed aside or excluded or rendered unworthy of consideration merely because they have been declared hostile. It was held that in appropriate cases, the court can rely upon the part of testimony of such witnesses if that part of the deposition is found to be credit worthy.

27. Shri R.L.Shrivastava P.W.32, deposed that on receiving information from two girls of Girls College, Ambikapur that his daughter Ku. Preeti was crushed under the Jeep he reached the hospital at 5 to 7 minutes after 11 A.M. and saw his daughter in deep coma, with her eyes bulging out. Just outside the door of minor operation theatre the staff of the Girls College and Ku. Lalita Yadav, Ku. Nisha, Ku. Vijaylaxmi and Seema Mishra were standing. As a most natural conduct he generally asked what happened and where and who saw? It is clear that he generally enquired from the girls who stood outside the minor operation theatre whereupon Lalita Yadav P.W.6, Vijaylaxmi P.W.7, Seema Mishra P.W.8 and Nisha Thakur P.W.17 spontaneously told him that they were sitting with Ku. Preeti by the side of the road when a Jeep with four boys entered the campus and crushed the tiffin and bag of Preeti and went ahead. Preeti decided that she would stop the Jeep on its return and ask the boys to make good the loss. She did so and stopped the Jeep on its return, stood in front of it and asked the driver as to how will she attend the next period since her bag was crushed. On hearing this, Samar Vijay, the driver said that she should give way, failing which she would be crushed under the Jeep. Javed, the boy sitting with the driver in front seat and Raj Kumar and Ganesh the other two boys sitting in the rear seat also said to the driver that if the girl does not give way she should be crushed. Javed, the boy sitting next to the driver said to him, "Samar

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Vijay crush the girl and run or else we would have to face serious trouble." This witness asked Vijay Laxmi P.W.7 and Ku. Lalita Yadav P.W.6 as to how they learnt the names of the driver and occupants of the Jeep. They told him that since the boys were laughing and taking each others name they learnt their names. The girls named above also told him that the driver suddenly drove the jeep with a jerk thereby pushing Ku. Preeti who was thrown by the side of the road. As the girls ran to lift Ku. Preeti the driver backed the Jeep and then crushing Preeti under the front tyre of the Jeep ran away. Vijay Laxmi P.W.7 also told him that when she caught the sweater of Raj Kumar who was sitting behind, he pushed her due to which she fell down.

28. Section 6 of the Evidence Act is an exception to the rule of evidence that hearsay evidence is not admissible. The test for applying the rule of res-gestae is that the statement should be spontaneous and should form part of the same transaction, ruling out any possibility of concoction. In ***Gentela Vijayavardhan Rao Vs. State of Andhra Pradesh*** reported in **A.I.R.-1996-S.C.-2791** para-15, it was held as follows:

> "Section-6 of the Evidence Act and some of the succeeding sections embody the rule of admission of evidence relating to what is commonly known as res gestae. They are in the *nature of exception to "hearsay" rule. Section-6* permits proof of collateral statements which are so connected with the facts in issue as to form part of the same transaction. Whether the statement made by a witness was a part of the same transaction or not is to be considered in the light of the circumstances of each case. The *principle is that it should be so intimately* connected with the fact in issue as to be a spontaneous utterance inspired by the *excitement of the occasion or a spontaneous* reaction thereof, there being no opportunity for deliberately fabricating the statement. In other words, the statement which is a part of res *gestae does not narrate a past event, but it is* the event itself speaking through a person thus excluding the possibility of any design behind *it.*"

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29. We have minutely gone through the cross-examination of R.L.Shrivastava. We find that there is not even an iota of material in his cross-examination which would rebut his above testimony or render it unworthy of credit. Nothing has been elicited which would even suggest that R.L.Shrivastava had any malice or motive to falsely implicate the appellants Samar Vijay Singh, Javed, Raj Kumar and Ganesh. The incident had occurred at 10.45 A.M. The girls and staff of the college had rushed Preeti to the hospital. Within minutes R.L.Shrivastava P.W.32 had reached the hospital. Preeti was alive though in deep coma at that time. After seeing Preeti's condition he was informed by Lalita Yadav P.W.6, Vijay Laxmi P.W.7, Seema Mishra P.W.8 and Ku. Nisha Thakur P.W.17 about the whole incident. Before this, Lalita Yadav P.W.6 and Vijay Laxmi P.W.7 had already given the brief history of the incident to Dr. M.L.Beatrice P.W.3 who had recorded it as "the injured being hit by the Jeep, and knocked down and passed over by the wheel of the Jeep". In the facts and circumstances of the case, we are of the considered opinion that the statement made by Ku. Lalita Yadav P.W.6, Ku. Vijaylaxmi P.W.7, Ku. Seema Mishra P.W.8 and Ku. Nisha Thakur P.W.17 to Shri R.L.Shrivastava P.W.32 is admissible under Section 6 of the Evidence Act as res-gestate despite the fact that the above mentioned girls have turned hostile since the statements were made to Shri R.L.Shrivastava soon after the occurrence when the girls were in a state of shock and there was not even the remotest possibility or even a thread of a chance of falsehood having crept in. Having given it our utmost serious consideration, we are unable to comprehend a situation in this case in which there could be even the slightest possibility that the girls could have been tutored. At the hospital, there was no one except the girl students who had witnessed the incident and their teachers. All of them stood aghast outside the minor operation theatre when Shri R.L.Shrivastava after having a look at Preeti who was in deep coma, came out and asked the crowd as to what had

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happened and where. The shocked girls blurted out truthfully the incident as it happened, to the father of the deceased Ku. Preeti when he reached the hospital within minutes of the occurrence. There was no chance for concoction or improvement by any one at that juncture. The fact that Ku. Lalita Yadav P.W.6 and Ku. Vijaylaxmi P.W.7 had in their statements recorded by A.S.I. Hardeep Singh P.W.36 on 3.12.1998 at the District Hospital under Section 161 Cr.P.C. also given an absolutely similar description of the incident and the manner in which they learnt the names of the driver and occupants of the Jeep rules out the possibility that R.L.Shrivastava P.W.32 might have subsequently made improvements in his statement. Thus, the testimony of R.L.Shrivastava P.W.32 is wholly reliable. It is thus established beyond doubt that the occupants of the Jeep were laughing and taking each others name as Raj Kumar, Ganesh and Javed who had asked the driver of the Jeep Samar Vijay to run the girl over if she did not give way. Thus the act of Samar Vijay in crushing Ku. Preeti under the Jeep was in furtherance of the common intention of the occupants of the Jeep i.e. Raj Kumar, Ganesh and Javed. In Gentela's case (supra) it was held that if there was time which was sufficient enough for fabrication then the statement is not part of res-gestae. However, as we have already held in this case there did not exist any possibility of fabrication or false implication of innocent persons since the girls or even Shri R.L.Shrivastava did not know the boys before the incident. Statement under Section 161 Cr.P.C. of Ku. Lalita P.W.6 and Ku.Vijaylaxmi P.W.7 were recorded on 3.12.1998 at the hospital itself by A.S.I. Hardeep Singh P.W.36 which give out the names of the driver and occupants of Jeep. Neither the father of the deceased nor A.S.I. Hardeep Singh had the slightest idea at that juncture as to who had caused the death of Preeti.

30. In *Malkhan Singh v. State of M.P.* **1990 Crl. L. J. 2763** the rule of res-gestae was not applied since the evidence of the

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two witnesses to whom the statements were made was found to be not reliable. The statement under Section 161 Cr.P.C. of one of the witnesses was recorded after 16 days and another witness was found to be an interested witness. However, in this case, statements under Section 161 Cr.P.C. of Vijaylaxmi and Lalita were recorded at the hospital itself on 3.12.1998. The testimony of Shri R.L.Shrivastava P.W.32 about the utterances made by the above mentioned witnesses to him at the hospital is not only wholly unrebutted in cross-examination but also inspires confidence. Shri R.L.Shrivastava would not have the slightest motive for implicating innocent persons and shielding the real culprits responsible for the murder of his daughter.

31. The evidence led by the prosecution fully satisfies the test laid down in *Pandurang & others v. State of Hyderabad* **A.I.R.1955 SC 216** and *Suresh & another v. State of U.P.* **A.I.R.2001 S.C. 1344** for ascertaining whether the appellants Samar Vijay, Javed, Raj Kumar and Ganesh Kashyap shared the common intention for causing the death of Preeti. The evidence clearly shows that the three occupants of the Jeep had asked the driver to run the girl over if she did not give way and Javed had said to Samar Vijay that he should better crush Preeti and run away or else will have to face trouble. The testimony of Nisha Thakur P.W. 17 in cross-examination para 13 also clearly shows that the occupants of the Jeep had asked the driver to run the girl over if she did not give way. The testimony of Ku. Seema P.W.8 in reply to question 34 also corroborates the above testimony in toto. Thus, the conditions necessary for arriving at a finding that the appellants had shared the common intention to cause the death of Preeti are satisfied. In *Suresh & another* (supra), the Apex Court went to the extent of saying that it was not necessary for attracting Section 34 of I.P.C. that the co-accused must be present at the scene of occurrence. Even an omission can in certain circumstances amount to an act. So

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the act mentioned in Section 34 of I.P.C. need not be an overt act, even an illegal omission to do a certain act in certain situation can amount to an act e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused who could have alerted the victim to move away to escape from the onslaught deliberately refrain from doing so with the idea that the blow should fall on the victim, such omission can also be termed as an act in a given situation. In the present case, the occupants of the Jeep were laughing at the insistence of Preeti standing before the Jeep, and exhorted Samar Vijay to run her over if she did not give way, in furtherance of which, Samar Vijay reversed the Jeep a little bit and accelerating it surged ahead crushing Preeting underneath. Thus, the common intention of the occupants of the Jeep in crushing Preeti under the Jeep while escaping from the college campus is clearly borne out.

32. Arvind Gaur P.W.12, Asst. Professor, P.G.College, Ambikapur has established that Samar Vijay, Ganesh and Raj Kumar Tiwari were his students and on 3.12.1998 Ganesh Kashyap was absent from college as per entry in the attendance register article-A. Similarly, the testimony of Professor Rajesh Shrivastava P.W.18 proved that Samar Vijay and Raj Kumar Tiwari were absent from College on 3.12.1998. We have also minutely examined the testimony of Abhaydeep Singh P.W.2 which establishes that Raj Kumar Tiwari had gone to him soon after the occurrence at 10.45 A.M. and stated that their vehicle had dashed against a girl. The above testimony finds corroboration from his statement Ex.P.3 recorded under Section 164 Cr.P.C. Nothing has been elicited in cross-examination to show that this witness bears any grudge against Raj Kumar or had any motive to falsely implicate him. The testimony of Abhaydeep Singh only proves a strong circumstance against the appellant Raj Kumar. It is not being used as an extra judicial confession of Raj Kumar since it

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does not by itself establish the guilt of the maker of such admission as held in *Kanda Padayachi v. State of Tamil Nadu* **A.I.R. 1972 SC 66 Para 13.** Similarly, the statement under Section 164 Cr.P.C. made by Abhaydeep Singh can also not be used as a substantive piece of evidence but only as a piece of corroborative evidence. The testimony of Inspector S.C.Mishra P.W.39 and the arrest memo Ex.P.74 also establish that appellant Javed had surrendered in Police Station Ambikapur on 4.12.1998 at 6.00 P.M. and was arrested.

33. Use of vehicle Jeep No. M.P.27-B-1068 in the incident is established by the fact that merg intimation Ex.P.19 by Mariam Tirki P.W.16 has been proved by Asst. Sub-Inspector Hardeep Singh P.W.36. It shows that the Jeep bearing registration No. M.P.27-B-1068 had crushed Ku. Preeti underneath. Seizure of Jeep M.P. 27-B-1068 which stood in front of the house of Samar Vijay vide Ex.P.33 is also established by A.S.I Hardeep Singh P.W.36. Ranvijay Singh Tomar, father of appellant Samar Vijay is the owner of the Jeep M.P. 27-B-1068 is also established by Z.A.Abbasi P.W.37 and not disputed. Ranvijay Singh Tomar had, in reply to Q.No.218 in examination under Section 313 Cr.P.C. also admitted this. Report of Forensic Science Laboratory, Saugor Ex.P.80 confirmed that the paint scratched from the stones in the college campus and the Jeep were of similar origin.

34. The injuries sustained by Ku. Preeti as given in the post-mortem report Ex.P.36 proved by Dr. A.K.Jain P.W.33 have been detailed by us in paragraph 8 supra which prove the tremendous force with which the stationery Jeep surged ahead after being reversed. Despite the fact that Ku. Preeti had fallen in front of the Jeep, the manner and the force in which appellant Samar Vijay reversed, accelerated and surged the jeep ahead on being exhorted by Raj Kumar, Javed and Ganesh to run the girl over, shows that the appellants shared

the common intention of causing the death of Ku. Preeti by crushing her under the Jeep. The testimony of R.L.Shrivastava P.W.32, Dr. A.K.Jain P.W.33, Ku.Nisha P.W.17 and Ku. Seema P.W.8 proves beyond doubt that death of Ku. Preeti was homicidal and in cold blood and not accidental by any stretch of imagination.

35. Having thus considered the rival contentions and the evidence led by the prosecution in its entirety, we are of the considered opinion that the trial Judge has rightly convicted the appellant Samar Vijay Singh under Section 302 I.P.C. and appellants Raj Kumar, Javed and Ganesh under Section 302 read with Section 34 I.P.C. The sentence imposed by the trial Judge also does not call for interference as the case does not fall within the category of rarest of the rare case and does not justify award of the extreme penalty of death. So far as co-accused Ranvijay Singh Tomar is considered, there is no evidence against him to hold him guilty under Section 201 of I.P.C. for causing disappearance of evidence of murder of Ku. Preeti.

36. In the result, Cr. Appeal No.594/2000 preferred by Samar Vijay Singh & Raj Kumar Tiwari and Cr. Appeal No.716/2000 preferred by Javed & Ganesh Kashyap fail and are hereby dismissed. Cr. Appeal No.1239/2000 filed by the State for enhancement of sentence awarded to the appellants Samar Vijay Singh and Raj Kumar Tiwari and Javed Alam and Ganesh Kashyap by the sessions Judge, Ambikapur in S.T.No.7/99 also fails and is hereby dismissed. Cr.Appeal No.783/2005 preferred by the State against the acquittal of Ranvijay Singh Tomar also fails and is hereby dismissed.

Per Hon'ble Fakhruddin,J

37. I have had the advantage of reading the Judgment of my esteemed learned brother Shri Dilip Raosaheb

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Deshmukh, J. I wholly agree with his reasoning and conclusion. However I would like to add regarding the nature of the offence, in view of the arguments advanced by the defence.

38. Shri Surendra Singh, learned Sr. Counsel appearing for the accused-appellants contended that the driver of the jeep merely wanted to get away as far as possible and in that process, the accident occurred and the case would fall under Section 304-A of I.P.C. He further contended that in any case, it would not travel beyond Section 304 Part-I as the alleged act was without any intention to kill Ku. Preeti Shrivastava. The main thrust of the argument advanced by the defence is that there was no intention to cause the death. Similar matter has been dealt with by the decision of Hon'ble Supreme Court in the case of Vasant –v- State of Maharashtra reported in 1998 CRI.L.J. 844. In Vasant's case death was resulted by running over of motor vehicle and question arose whether the death is accidental or intentional. The trial Court held that there was no strong motive for the appellant to murder the deceased. It believed that he had gone to the extreme wrong side of the road and knocked down the deceased but in absence of any intention to kill, the trial Court held that the death of Shridhar was caused as a result of rash and negligent driving of jeep. The trial Court, therefore, convicted the appellant under Section 304-A of the IPC and not under Section 302 of I.P.C. The appellant therein challenged his conviction under Section 304-A of I.P.C. and the State filed an appeal against his acquittal under Section 302 of I.P.C. Taking into consideration the facts and circumstances, the High

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Court allowed the State appeal and convicted the appellant therein under Section 302 of I.P. C. and dismissed the appeal filed the appellant and held that all the circumstances proved by the evidence of PWs 2, 3 and 4 clearly indicate that what was done by the appellant was done intentionally. The High Court took note of the fact that the place where the incident took place was a Tar Road 19 feet in width. At the time of incident, no other pedestrian or vehicle was passing on that road. The High Court, therefore, took the view that there was no other reason for the appellant to take his jeep in great speed on the wrong side of the road.

39. The matter went to the Supreme Court. The Hon'ble Supreme Court elaborately considered the matter in para 8 and the same is quoted below:-

> "8. Learned counsel for the appellant is not in a position to point out that any of the reasons given by the High Court is wrong. So far as P.W. 4 is concerned, the High Court has given good reasons to bclicvc his prcscncc at thc timc of incidcnt and for accepting his evidence. He has in clear terms stated that the appellant had gone running towards the spot where the boring work was going on. The appellant sat in the jeep which was standing there and took it in reverse up to the intersection which meets the National Highway. The appellant then came in great speed with the result he got frightened and ran for cover. The appellant then knocked down Shridhar. The evidence of P.W.s 2 and 3 also support this version. Once it is believed that the appellant behaved in that manner and it is also believed that there was no other reason for the appellant to go on the wrong side of the road, it has to be held that whatever the appellant had done was done intentionally and the incident did not happen accidentally.

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40. In the present case injuries sustained by the deceased Ku. Preeti as given in the post mortem report Ex. P-36 proved by Dr. A.K. Jain P.W.33, prove tremendous force with which the stationery Jeep surged ahead after being reversed. Despite the fact that Ku. Preeti had fallen in front of the Jeep, the manner and the force in which appellant Samar Vijay reversed, accelerated and surged the jeep ahead on being exhorted by Raj Kumar, Javed and Ganesh to run the girl over, it was to be held that whatever the appellant had done was done intentionally and not accidentally.

41. Appellants Javed Alam and Ganesh are on bail pursuant to order dated 27-7-2000. Their bail bonds are cancelled. They shall now surrender before the Chief Judicial Magistrate, Ambikapur on or before 1.05.2006 for undergoing the remaining sentence.

42. In the end, we appreciate the valuable assistance rendered by learned counsel who appeared in this case.

A copy of this judgment be kept in the records of all the connected cases.

Sd/-
Fakhruddin
Judge

Sd/-
Dilip Raosaheb Deshmukh
Judge